UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, Plaintiff, v. Tyson Foods, Inc., et al., Defendants.	)	05-CV-0329 GKF-SAJ **DEFENDANTS CARGILL, INC.'S AND CARGILL TURKEY PRODUCTION, LLC'S JOINT TRIAL BRIEF**

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Defendants Cargill, Inc. and Cargill Turkey Production, LLC ("the Cargill Defendants") submit the following Trial Brief addressing the issues remaining for trial. Because the Court has only recently heard dispositive motions detailing the parties' positions on the various issues, this brief aims to provide the Court with a straightforward guide to (1) some of the overarching legal doctrines at issue, (2) the elements of the State's remaining claims, and (3) the rules governing the remedies that the State seeks.

ARGUMENT

I. ISSUES COMMON TO ALL CLAIMS

Although the Court addressed the issues of primary jurisdiction and political questions early in the case, the evidence developed through discovery strongly suggests that these issues are likely to arise again in the context of the trial.

A. Primary Jurisdiction of the State Agencies

The doctrine of primary jurisdiction instructs federal courts to decline to rule on issues "involving technical and intricate questions of fact and policy that [a legislature] has assigned to a specific agency." TON Servs. v. Qwest Corp., 493 F.3d 1225, 1238-39 (10th Cir. 2007). The doctrine "comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." Int'l Brotherhood of Boilermakers v. Hardeman, 401 U.S. 233, 238 (1971).

The doctrine recognizes "'that in cases raising issues of fact not within the conventional experience of judges or [in] cases requiring the exercise of administrative discretion, agencies created by [the legislature] for regulating the subject matter should not be passed over.'" Id. (quoting Far E. Conference v. United States, 342 U.S. 570, 574 (1952)). As the Supreme Court

has explained, courts should defer to agencies with primary jurisdiction because "[u]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." Far E. Conference, 342 U.S. at 574-75. The Tenth Circuit has similarly explained the that "[t]he purpose of the doctrine is to 'allow agencies to render opinions on issues underlying and related to the cause of action.'" TON Servs., 493 F.3d at 1239. Under Tenth Circuit law, the trial court must "consider whether the issues of fact in the case: (1) are not within the conventional experience of judges; (2) require the exercise of administrative discretion; or (3) require uniformity and consistency in the regulation of the business entrusted to the particular agency." Id. (internal quotations omitted).

Here, the Court must consider the issue of primary jurisdiction in the context of the authority and responsibilities of the Oklahoma Department of Agriculture, Food and Forrestry ("ODAFF") and the Arkansas Soil and Water Conservation Commission ("ASWCC") concerning the land application of poultry litter. See, e.g., 27A Okla. Stat. § 1-3-101(D)(1)(a) (charging ODAFF with oversight and regulation of "nonpoint source runoff from … agricultural services, … and animal waste"); 2 Okla. Stat. § 10-9.1, et seq., (Registered Poultry Feeding Operations Act, including provisions giving ODAFF duty of developing approved Animal Waste Management Plans ("AWMPs") incorporating Best Management Practices promulgated by ODAFF for utilization of poultry litter); OAC §§ 35-17-3 and 35-17-5, et seq., (ODAFF litter practice guidelines); Ark. Code Ann. § 15-20-901, et seq. (Poultry Feeding Operations Registration Act, implemented and enforced by ASWCC); Ark. Code Ann. § 15-20-1001, et seq.

(Soil Nutrient Management Planner and Application Certification Act, implemented and enforced by ASWCC); and Ark. Code. Ann. § 15-20-1101, et seq. (Soil Nutrient Application and Poultry Litter Utilization Act, implemented and enforced by ASWCC).[1]

B. Non-Justiciable Political Questions

The Court must also consider the extent to which the claims before it constitute non-justiciable political questions. "Prudence, as well as separation-of-powers concerns, counsels courts to decline to hear 'political questions.'" Schroder v. Bush, 263 F.3d 1169, 1173 (10th Cir. 2001) (citing, e.g., Baker v. Carr, 369 U.S. 186, 210 (1962). "[J]udicial review [of political questions] would be inconsistent with the Framers' insistence that our system be one of checks and balances." Nixon v. United States, 506 U.S. 224, 234-35 (1993).

The Tenth Circuit instructs that in "deciding whether issues present political questions, courts must make a discriminating inquiry into the precise facts and posture of the particular case." Schroder, 263 F.3d at 1173-74 (internal quotation omitted). The Supreme Court has set forth "six independent tests" for determining the existence of a political question, "listed in descending order of both importance and certainty":

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Vieth v. Jubelirer, 541 U.S. 267, 278-79 (2004) (quoting Baker, 369 U.S. at 217). Here, the Court must consider the State's common law claims in the context of at least the second, third,

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[1] See also, e.g., Defendants' briefs on primary jurisdiction at Dkts. 67, 75, 142, and 149.

and fourth independent political question tests. See, e.g., id.; Conn. v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 271-73 (S.D.N.Y. 2005).[2]

II. THE ELEMENTS OF THE REMAINING CLAIMS

A. The Claims Remaining for Trial

The State's Second Amended Complaint (Dkt. 1215) alleged ten counts against Defendants. The Court has dismissed five of those claims in their entirety (Counts 1, 2, 8, 9, and 10) and has narrowed the scope of four others (Counts 4, 5, 6, and 7).[3] As a result, only the

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[2] See also Defendants' briefs on the political question doctrine at Dkts. 65, 75, 146, and 149.

[3] By Order of July 22, 2009, this Court dismissed Count 1 for cost recovery under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, et seq.; Count 2 for natural resource damages under CERCLA; and Count 10 for unjust enrichment under Oklahoma common law. (Dkt. 2362 at 23.) The Court granted partial summary judgment on Count 8 for violations under Oklahoma's Registered Poultry Feeding Operations Act, 2 Okla. Stat. § 10-9.7 and OAC § 35:17-5-5. Although the Court allowed a discrete portion of Count 8 to proceed, (Aug. 18, 2009 Hrg. Tr. at 153:22 – 154:16: Dkt. 2548), the State later voluntarily dismissed the remainder of Count 8 (see Dkt. 2569 at 2). During the course of litigation the State also voluntarily dismissed with prejudice its Count 9, which alleged violation of Oklahoma's Concentrated Animal Feeding Operation Act, 2 Okla. Stat. § 9-200, et seq. (May 12, 2009 Min. Ord.: Dkt. 2042.)

The Court's July 22, 2009 Order also narrowed the scope of Plaintiff's remaining Counts by dismissing all damages claims under Counts 4, 5, and 6 for Oklahoma common law nuisance, federal common law nuisance, and Oklahoma common law trespass. Only the injunctive aspects of these torts remain for trial. (Dkt. 2362 at 23.) With respect to Counts 4 and 5 for nuisance, the State has represented that it is not pursuing injunctive relief under its private nuisance claim, rendering that claim moot for purposes of the present trial. (Aug. 18, 2009 Hrg. Tr. at 32:18 – 33:19: Dkt. 2548.) The Court also dismissed Plaintiff's Count 4 claim for Oklahoma public nuisance insofar as it attempted to reach activities in Arkansas. (Id. at 188:7-11.)

This Court also narrowed the scope of Plaintiff's Count 7 alleging violations of general environmental prohibitions in 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1, holding that this statutory claim reaches only conduct that occurred within the borders of Oklahoma. (Aug. 18, 2009 Hrg. Tr. at 100:13 – 101:8: Dkt. No. 2548; see also June 15, 2007 Hrg. Tr. at 16:22-25: Dkt. 1204; Pl.'s Resp. to Defs.' Mot. Structure Trial at 1: Dkt. 2600; Defs.' Reply in Supp. Mot. Structure Trial at 3, n.1: Dkt. 2606 (collecting references).) The Court also found that Plaintiff's Count 7 claim does not reach the conduct of third parties with no contractual relationship to Defendants, at least not through Restatement (Second) of Torts § 427B, the only theory that the State has articulated on this point. (Sept. 4, 2009 Hrg. Tr. at 240:3 – 244:10: Dkt. 2604; see also Pl.'s Resp. to Defs.' Mot. Structure Trial at 6, n.3: Dkt. 2600.)

following claims remain to be decided at the trial in this matter:

- Count 3 asserting a citizen suit under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B).
- Count 4's claim for Oklahoma nuisance per se, alleging that the land application of poultry litter is at all times and in all locations a public nuisance.
- Count 4's claim for Oklahoma common law public nuisance.
- Count 5 for federal common law public nuisance.
- Count 6 asserting Oklahoma common law trespass.
- Count 7 insofar as it implicates conduct occurring within Oklahoma by Defendants or their independent contract growers (as opposed to other third parties).

B. The Elements of the Remaining Claims.

1. RCRA Citizen Suit

Plaintiff's Count 3 asserts a claim for injunctive relief, civil penalties, and all costs of litigation under the citizen suit provision of RCRA (also known as the "Solid Waste Disposal Act"). (Sec. Am. Compl. ¶¶ 89-96: Dkt. 1215.) To succeed on its RCRA citizen-suit claim, the State must show as to each Defendant that that Defendant is 1) "a person;" 2) that "contributed to, or is contributing to, the handling, storage, treatment, transportation, or disposal of solid … waste;" and 3) "that such waste may present an imminent and substantial endangerment to health or the environment." Burlington N. & Santa Fe Ry. v. Grant, 505 F.3d 1013, 1019-20 (10th Cir. 2007) (quoting in part 42 U.S.C. § 6972(a)(1)(B)). RCRA defines "solid waste" in pertinent part to include "any garbage, refuse, sludge from [certain facilities] and other discarded material, including solid, liquid, [or] semisolid … material resulting from … agricultural operations." 42 U.S.C. § 6903(27).

RCRA reaches only materials that have actually been discarded, not valuable materials being put to a beneficial use. See, e.g., 40 C.F.R. § 261.2(a)(1); 94 Cong. House R. 1491, *2 (1976); H.R. Rep. No. 94-1491, 94th Cong., 2d Sess., at 2, reprinted in 1976 U.S.C.C.A.N. 6238,

6240; Criteria for Classification of Solid Waste Disposal Facilities and Practices, 44 Fed. Reg. 53,438, 53,440 (Sept. 13, 1979); 43 Fed. Reg. 58,946, 58,954 (Dec. 18, 1978). Materials are likewise not solid waste when "[u]sed or reused as effective substitutes for commercial products." 40 C.F.R. §261.2(e)(ii); see also Safe Food & Fertilizer v. EPA, 350 F.3d 1263, 1268 (D.C. Cir. 2003); Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1047 (9th Cir 2004). The character of a substance as "waste" must be evaluated from the point of view of those who have it and those who are willing to pay for it. See Safe Food, 350 F.3d at 1269.

"Contributing to" liability under RCRA is limited to the "handling, storage, treatment, transportation, or disposal" of solid wastes. 42 U.S.C. § 6972(a)(1)(B). Thus, the mere creation or generation of solid waste does not suffice to trigger liability. Except for the rare company-owned farm, the poultry litter at issue in this case is owned, controlled, land applied, transported, treated, or sold by individual contract growers, not Defendants.

To prove "an imminent and substantial endangerment," the State must demonstrate that the challenged conduct results in either "actual harm" or "the risk of threatened harm." Burlington N., 505 F.3d at 1021. The alleged "risk" must be "substantial," 42 U.S.C. § 6972(a)(1)(B), which means that the State must prove the risk is "serious" and must show "reasonable cause for concern that someone or something may be exposed to risk of harm by release, or threatened release, of [solid waste] in the event remedial action is not taken." Id. The State here alleges two discrete health risks: 1) that bacteria from poultry litter may endanger individuals recreating in or drinking water from the IRW, and 2) that nutrients from poultry litter may stimulate algae growth, which when removed by chlorination risks the creation of

disinfection byproducts that may endanger human health.[4]

2. Oklahoma Common Law Nuisance

The State alleges two surviving claims under Count 4 for Oklahoma nuisance – public nuisance and nuisance per se – both based on claimed activity within Oklahoma. (Second Am. Compl. ¶¶ 97-107.) Oklahoma statutorily defines a nuisance as

> unlawfully doing an act, or omitting to perform a duty, which act or omission either:
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> First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or
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> Second. Offends decency; or
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> Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or
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> Fourth. In any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities.

50 Okla. Stat. § 1. The wording of the statute requires an unlawful act or omission by the defendant. See Thompson v. Andover Oil Co., 691 P.2d 77, 83 (Okla. Ct. App. 1984). Nuisance "is a class of wrongs which arises from an **unreasonable, unwarranted, or unlawful use** by a person or entity of property lawfully possessed, but which works an obstruction or injury to the right of another." Briscoe v. Harper Oil Co., 702 P.2d 33, 36 (Okla. 1985) (emphasis added). Thus, "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." 50 Okla. Stat. § 4.

The State also asserts that each Defendant *intentionally* caused a nuisance, and has disavowed any claim that any nuisance arose from negligent or other non-intentional conduct by any Defendant. (Aug. 10, 2006 Hrg. Tr. at 7:3-5: Dkt. 910 ("Notably the common law claims

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[4] See also Defendants' briefing on these RCRA issues at Dkts. 64, 145, 1531, 2050, and 2237.

are pled as intentional torts. ... [T]hat's important point to make up front."); see also id. at 14:2–16:18.) As a result, the State must meet the legal standard for such "intentional invasion":

> An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor
> (a) acts for the purpose of causing it, or
> (b) knows that it is resulting or is substantially certain to result from his conduct.

Restatement (Second) of Torts § 825.

a. Oklahoma Public Nuisance

Oklahoma defines a public nuisance as a nuisance "which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal." 50 Okla. Stat. § 2. Hence, courts have found that "[w]here the nuisance affects any considerable number of persons, it is a public nuisance." Swanson v. City of Tulsa, 633 P.2d 1256, 1257 (Okla. Crim. App. 1981). However, to be a public nuisance, the act or omission that constitutes the nuisance must itself affect a community of people at the same time, and cannot be a series of like acts each affecting a few people at a time. See City of McAlester v. Grant Union Tea Co., 98 P.2d 924, 926 (Okla. 1940) (door-to-door salesmen not a public nuisance because only one household is disturbed at a time).

b. Oklahoma Public Nuisance Per Se

Plaintiff's Count 4 also claims that Defendants' "pollution" and "placement / contribution to the placement of poultry wastes where they are likely to cause pollution," constitute a per se public nuisance under 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1. (Second Am.

Compl. ¶¶ 103-04.)[5] Section § 2-6-105 of Oklahoma Title 27A makes it unlawful to "cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state," declaring "any such action" to be "a public nuisance." 27A Okla. Stat. § 2-6-105(A). Section 2-18.1 of Oklahoma Title 2 similarly makes it "unlawful ... for any person to cause pollution of any air, land or waters of the state by persons which are subject to the jurisdiction of [ODAFF]."

Nuisance per se is "an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings." Sharp v. 251st St. Landfill, Inc., 810 P.2d 1270, 1276 n.6 (Okla. 1991) (citing McPherson v. First Presbyterian Church, 248 P. 561, 564 (Okla. 1926)), overruled on other grounds by DuLaney v. Okla. State Dep't of Health, 868 P.2d 676, 678-79 (Okla. 1993). Sharp found that a landfill is not a nuisance per se in Oklahoma, but noted that if a landfill were a nuisance at all, it would be a nuisance per accidens or a nuisance in fact, defined as an "act, occupation, or structure" that *may* become a nuisance "by virtue of the circumstances, location, or surroundings." Id. (citing, among other cases, McPherson, 248 P. at 564-65). McPherson noted that bowling alleys, carpet cleaning businesses in high density residential neighborhoods, coal sheds and yards, factories, and filling stations were *not* nuisances per se in Oklahoma. McPherson, 248 P. at 565 (citations omitted).[6]

3. Federal Common Law Nuisance

The State also asserts a claim for public nuisance under the federal common law (Sec. Am. Compl. ¶¶ 108-17) , relying on language from the Restatement (Second) of Torts § 821B

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[5] The State separately pled violation of 27A Okla. Stat. § 2-6-106 and 2 Okla. Stat. § 2-18.1 as Count 7, discussed infra.

[6] See also Defendants' briefs on these state nuisance issues at Dkts. 75, 149, 2033, and 2231.

that defines a public nuisance as "an unreasonable interference with a right common to the general public." A finding of public nuisance may rest on conduct that "involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience," "is proscribed by a statute, ordinance or administrative regulation," or "is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right." Id. "[T]he question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality." Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

There is, however, "no federal general common law." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). The Supreme Court has particularly recognized that "the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the [Clean Water Act ("CWA")] ...." Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 22 (1981) (discussing Illinois v. Milwaukee, 406 U.S. 91 (1972) ("Milwaukee I") and Milwaukee v. Illinois, 451 U.S. 304 (1981) ("Milwaukee II")); see also Penn. v. Union Gas Co., 491 U.S. 1, 20 (1989) (discussing Milwaukee I).[7] In 1992, the Supreme Court reaffirmed this position in a finding against the state of Oklahoma. Arkansas v. Oklahoma, 503 U.S. 91, 98-99, 112 (1992) (discussing Milwaukee II's holding that CWA's

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[7] The Supreme Court issued Milwaukee I prior to the passage of the 1972 amendments to the CWA, finding that federal common law governed interstate water pollution. 406 U.S. at 103-04. However, perhaps because of the then-pending CWA bill, the Court remarked: "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." Id. at 107. In Milwaukee II, the Court held the comprehensive regulatory regime created by the 1972 CWA amendments indeed preempted the state of Illinois' federal common law nuisance claim. 451 U.S. at 317, 325-36.

comprehensive regulatory scheme preempts federal common law nuisance).

Several Circuit Courts of Appeal, including the Tenth Circuit, have recognized that the Supreme Court abrogated federal common law nuisance in water pollution cases. E.g., Gallegos v. Lyng, 891 F.2d 788, 798 (10th Cir. 1989) (restating the holding in Milwaukee II that "Congress had not left the formulation of appropriate federal water pollution standards to the courts through application of nuisance concepts, but had occupied the field through the establishment of a *comprehensive* regulatory program under the [CWA] Amendments.") (emphasis in original); Conner v. Aerovox, Inc., 730 F.2d 835, 837-88 (1st Cir. 1984).[8]

4. Trespass

In Count 6, the State alleges trespass to "Oklahoma's possessory property interest in the water in that portion of the [IRW] located within the territorial boundaries of the State of Oklahoma which runs in definite streams, formed by nature, over or under the surface." (Second Am. Compl. ¶ 119.) Under Oklahoma law, trespass requires an "actual physical invasion of the real estate of another without the permission of the person lawfully entitled to possession." E.g., Williamson v. Fowler Toyota, 956 P.2d 858, 862 (Okla. 1998) (citation omitted); accord Lawmaster v. Ward, 125 F.3d 1341, 1352 (10th Cir. 1997) (quoting Fairlawn Cemetery Ass'n v. First Presbyterian Church, 496 P.2d 1185, 1187 (Okla. 1972)). Trespass protects a possessor's interest in exclusive possession of property. Nichols v. Mid-Continent Pipe Line Co., 933 P.2d 277, n.12 (Okla. 1996). Thus, a plaintiff may succeed on a claim for trespass to only those lands or water rights over which the plaintiff has the sort of exclusive possessory interest traditionally protected by trespass law. See New Mexico v. Gen. Elec. Co., 335 F. Supp. 2d 1185, 1234-35

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[8] See also Defendants' briefs on federal common law nuisance at Dkts. 66, 75, 144, 149, 2033, and 2231.

(D.N.M. 2004) (concluding that the state's broad sovereign interests in protecting state waters fell outside scope of protection trespass law traditionally afforded to private landowners' right of exclusion possession), upheld at 467 F.3d 1223, 1248 n.36 (10th Cir. 2006).

In addition, "[c]onduct which would otherwise constitute a trespass is not a trespass if it is privileged. Such a privilege may be derived from the consent of the possessor, or may be given by law because of the purpose for which the actor acts or refrains from acting." Restatement (Second) of Torts § 158 cmt. E; accord, e.g., Walters v. Prairie Oil & Gas Co., 204 P. 906, 908 (Okla. 1922).[9]

5. Oklahoma Statutory Pollution Claim

The State alleges in Count 7 that each of the Defendants violated 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1. To establish liability under these statutes, the State must prove that Defendants, through their actions within Oklahoma, (1) "cause[d] pollution of any waters of the state" or (2) "place[d] or cause[d] to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state." 27A Okla. Stat. § 2-6-105(A).

Section 2-6-105(A) establishes a species of nuisance claim that requires specific evidence of liability, not merely generalized assertions of conduct. The State must prove that particular Defendant(s) caused particular violation(s) on particular days. See Moore v. Texaco, Inc., 244 F.3d 1229, 1231-32 (10th Cir. 2001) (rejecting generalized allegations in the absence of all potential sources of the alleged pollution); see also Smicklas v. Spitz, 846 P.2d 362, 366 (Okla. 1992); N.C. Corff P'ship, Ltd. v. Oxy USA, Inc., 929 P.2d 288, 295 (Okla. Civ. App. 1996); see, e.g., Brennan v. OSHRC, 511 F.2d 1139, 1145 (9th Cir. 1975) ("Fundamental fairness would

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[9] See also, e.g., Defendants' briefing on trespass issues at Dkts. 1076, 1128, 2055, and 2236.

require that one charged with and penalized for violation be shown to have caused, or at least to have knowingly acquiesced in, that violation."); 27A Okla. Stat. § 2-3-504(A)(2)&(D) (defining violation by "each day or part of a day upon which" it occurred).

This Court has found that the statutes implicated in Count 7 are "clearly intended to punish culpable actors," and that "the explicitly stated statutory purpose of any civil penalties assessed under the statute is to punish." (Aug. 2, 2009 Ord. at 2: Dkt. 2527.) The rule of lenity applies to claims for such punitive civil sanctions, see NOW v. Scheidler, 510 U.S. 249, 262 (1994), and requires that if the State seeks to penalize a defendant, the court must resolve any statutory ambiguities in favor of that defendant. E.g., United States v. Granderson, 511 U.S. 39, 54 (1994); Crandon v. United States, 494 U.S. 152, 159 (1990).[10]

III. REMEDIES

In the Counts of its Complaint remaining at issue, the State seeks two different kinds of substantive relief: (1) injunctive relief under RCRA, common law nuisance, common law trespass, and pursuant to 27A Okla. Stat. § 2-3-504 and (2) civil penalties pursuant to 27A Okla. Stat. § 2-3-504.[11]

A. Injunctive relief

An injunction is an extraordinary equitable remedy, and it "is not a remedy which issues as of course," Weinberger v. Romero-Barcelo, 456 U.S. 305, 312-13 (1982), or "'to restrain an

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[10] See also Defendants' briefing on these Count 7 issues at Dkts. 2057, 2254, 2552, and 2606.

[11] The State's Second Amended Complaint also purports to seek civil penalties under RCRA. (See Dkt. No. 1215 ¶ 96.) Civil penalties under RCRA, however, are available only for noncompliance with the Hazardous Waste Management subtitle of RCRA, 42 U.S.C. §§ 6921, et seq., which is not part of the State's claims. Moreover, any liability for any such penalty would be only to the United States, not to a party pursuing a citizen suit like the State does here. See 42 U.S.C. §§ 6972(a), 6928(a), 6928(g).

act the injurious consequences of which are merely trifling,'" id. (quoting Consol. Canal Co. v. Mesa Canal Co., 177 U.S. 296, 302 (1900)). An injunction should issue only if "intervention of a court of equity 'is essential in order effectually to protect property rights against injuries otherwise irremediable.'" Id. at 312 (quoting Cavanaugh v. Looney, 248 U.S. 453, 456 (1919)).

For the State to obtain the permanent injunction it seeks here, it must demonstrate: (1) actual success on the merits of the underlying claim; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs any harm that the injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest. E.g., Prairie Band Potawatomi Nation v. Wagnon, 476 F.3d 818, 822 (10th Cir. 2007); see also Oklahoma v. Tyson Foods, Inc., 565 F.3d 769,776 (10th Cir. 2009) (affirming similar standard for preliminary injunction earlier in the present litigation).[12]

1. Preventive/Prohibitory Injunctions vs. Mandatory/Reparative Injunctions.

The law recognizes two basic types of injunctions, which involve different standards of review. The first type of injunction is a preventive or prohibitive injunction, which bars a defendant from altering the status quo by engaging in specific future conduct. See, e.g., Roe v. Cheyenne Mt. Conf. Resort, 124 F.3d 1221, 1230 (10th Cir. 1997) (addressing request for injunction to bar employer from implementing drug testing policy). The second type of injunction is a mandatory or reparative injunction, which "disturb[s] the status quo by ordering affirmative relief." E.g., Johnson v. Kay, 860 F.2d 529, 541 (2d Cir. 1988). Because it alters the

[12] As the Tenth Circuit has noted, the standard for a permanent injunction is "remarkably similar to the standard for a preliminary injunction. The only measurable difference between the two is that a permanent injunction requires showing actual success on the merits, whereas a preliminary injunction requires showing a substantial likelihood of success on the merits." Prairie Band, 476 F.3d at 822 (citations omitted).

status quo, the standard for granting a mandatory injunction is stricter than that applicable to a prohibitory injunction. Tyler v. City of Manhattan, 857 F. Supp. 800, 820 (D. Kan. 1994). Mandatory injunctive relief "is a harsh remedial process not favored by the courts," and should be granted only under compelling circumstances. Citizens Concerned for Separation of Church & State v. City & County of Denver, 628 F.2d 1289, 1299 (10th Cir. 1980).

Although a portion of the injunction the State seeks would clearly be mandatory and therefore subject to the stricter standard,[13] the State phrases another portion of its request as if it sought a prohibitive injunction, that is, that it is merely asking the Court to stop Defendants from engaging in particular future conduct. Specifically, the State seeks an injunction "restraining each and all of the Poultry Integrator Defendants from their respective pollution-causing conduct – including immediate cessation of all releases of poultry waste constituents to the soils and waters of the State of Oklahoma." (Sec. Am. Compl. ¶¶ 95, 104, 115, 123: Dkt. 1215.) In subsequent submissions, the State has narrowed this request and now "ask[] the Court to enjoin land application [of poultry litter] above agronomic needs for phosphorus." (Dkt. No. 2579 at 5.)

Although the State frames this portion of the proposed injunction to make it appear to be merely prohibitory, it is not. All aspects of the injunctive relief the State seeks actually demand that Defendants take action. The overwhelming majority of land application in the IRW is of poultry litter that Defendants do not own on fields that Defendants do not operate by contract

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[13] Plaintiff also seeks an injunction overtly compelling Defendants to act:

> to remediate the IRW, including the lands, waters and sediments therein, to take all such actions as may be necessary to abate the imminent and substantial endangerment to the health and the environment, and to pay all costs associated with assessing and quantifying the amount of remediation and natural resource damages as well as the amount of natural resource damages itself…

(Sec. Am. Compl. at 34: Dkt. 1215.)

growers that Defendants do not control.[14] As a result, Plaintiff's request that the Court enjoin land application of litter is not merely a request for Defendants to cease an activity, but a request for this Court to require Defendants to reach out and affirmatively alter the conduct and practices of third parties. Because of the true character of the relief Plaintiff seeks, the Court should apply the stricter mandatory injunction standard to all of the injunctive relief Plaintiff requests.

2. Questions the Court must consider in addressing Plaintiff's requested mandatory injunctions.

In considering Plaintiff's proposed injunctions against each of the individual Defendants, the Court must answer each of the following questions:

a. Does the Defendant against whom relief is sought presently land-apply poultry litter as fertilizer in the IRW or contract with growers whose poultry litter is land-applied as fertilizer in the IRW?

For a plaintiff to have standing to seek an injunction directing a defendant to alter some conduct, that defendant must be engaged, or likely to engage, in the conduct to be enjoined. See Nova Health Sys. v. Gandy, 416 F.3d 1149, 1154-55 (10th Cir. 2005) (holding party has standing to seek injunction only if party "face[s] a concrete and actual or imminent injury in fact that was caused by the defendants in this case and that was redressable by a favorable judicial order"). The threshold question raised by Plaintiff's request for prospective relief against any Defendant is thus whether that Defendant has current poultry-litter-related activities in the IRW.

b. Has the State proven a right to injunctive relief as to each grower whose land application of poultry litter it seeks to enjoin?

To justify an injunction against a particular Defendant with respect to the land application of poultry litter by a particular contract grower, the State must demonstrate that the

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[14] The only narrow exception to this is the few facilities that some Defendants own and operate themselves.

particular grower applies poultry litter in a manner that causes an imminent and substantial endangerment to human health under RCRA or that constitutes a nuisance or trespass under state law. See Prisco v. A & D Carting Corp., 168 F.3d 593, 609-10 (2d Cir. 1999) (affirming dismissal of RCRA claim because plaintiff "failed to connect any individual private defendant to any particular solid waste with known hazardous properties" on the relevant site).

c. Has the State Proven that each Defendant's conduct will cause an irreparable harm in the absence of an injunction?

To justify an injunction, the State must demonstrate that irreparable harm will result unless the injunction is issued. Prairie Band, 476 F.3d at 822. As this Court held in ruling on Plaintiff's motion for preliminary injunction, the fact that the State seeks relief under an environmental statute means that the Court should give particular consideration to the public interest factor (discussed below), but it does not relieve the State of the burden of demonstrating irreparable injury. (See Sept. 29, 2008 Ord. at 2-3: Dkt. 1765 (citing Weinburger, 456 U.S. at 312-13, and Wilson v. Amoco Corp., 989 F. Supp. 1159, 1171 (D. Wyo. 1998)).)

The irreparable harm must also be reasonably certain. "[I]njunctive relief is proper upon a showing that there is a reasonable probability that the injury sought to be prevented will occur if no injunction is issued; a mere fear or apprehension of injury is insufficient." Burlington N., 505 F.3d at 1023; see Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court.'" (alterations in original)).

d. Has the State proven that the threatened harm from each Defendant's conduct outweigh the injury to that Defendant and others that the injunction will cause?

The State must also prove that the injury that the injunction would address outweighs any harm that the injunction may cause. Prairie Band, 476 F.3d at 822. The balance of harms must

"tip decidedly" toward the State to justify an injunction. See, e.g., Gen. Mills, Inc. v. Kellogg Co., 824 F.2d 622, 624-25 (8th Cir. 1987). In testing this balance, the Court must consider "the possibility of harm to other interested persons from the grant or denial of the injunction." Acierno v. New Castle County, 40 F.3d 645, 653 (3d Cir. 1994) (citation omitted); see also Virg. Petroleum Jobbers Ass'n. v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). Here, such persons would include the independent growers who actually own the poultry litter, who are contractually committed to indemnify the Defendants for any damages or expenses caused by the application of that poultry litter, and whose fields might be the target of any "remediation."

With respect to Plaintiff's request for a mandatory injunction directing remediation as a remedy for its nuisance and trespass claims, Oklahoma law has already made a specific judgment about the balance between the burden of the injury and the cost of the injunction: "When the cost of repairing the injury is greater than the diminution in the land's value, the latter is the true measure of damages." Burlington N., 505 F.3d at 1027 (citing Houck v. Hold Oil Corp., 867 P.2d 451, 460 (Okla. 1993)). The Cargill Defendants submit that under this principle, the Court may not impose a mandatory injunction on Defendants to remediate some or all of the IRW unless the cost of the remediation is less than the demonstrated diminution of value of the land of the IRW caused by Defendants' conduct.

e. Has the State proven that the injunction as to each Defendant is in the public interest?

To justify an injunction, the State must demonstrate that the injunction is in the public interest. Prairie Band, 476 F.3d at 822. Although the protection of the environment and human health are undeniably substantial public interests, the circumstances here also involve other public interests that would be undermined by the injunction the State seeks. For example, both Oklahoma and Arkansas have a demonstrated public interest in supporting and promoting

agriculture in general and the land application of poultry litter specifically, and have already defined the balance between the public's environmental and economic interests through the regulations adopted by and permits issued by ODAFF, ASWCC, and the Arkansas Natural Resources Commission. See OAC §§ 35:17-5-1; Ark. Code Ann. § 15-20-902(1)&(2); see also PI Hearing Tr. at 1404:20 – 1405:2: Dkt. 1661 (Executive Director Young of the Arkansas Natural Resources Commission expressing concern over threatened invalidation of Arkansas regulations). The Court's consideration of the requested injunction will need to take into account both these competing public interests and the states' established balance between them.

f. Has the State proven that it has no other means available short of the proposed injunction to remedy the claimed imminent and substantial endangerment to human health?

Federal courts are reluctant to use their extraordinary injunctive powers where the party requesting the injunction is capable of achieving the same results through its own political and administrative processes without the court's intervention. See, e.g., Des Moines v. Chicago & Nw. Ry., 264 F.2d 454, 459 (8th Cir. 1959) (holding that "the trial court was entitled to require that the administrative question inherent in the situation be precedingly referred" to an administrative agency with authority before adjudicating the motion for injunction). This is especially true in the RCRA context. See Hallstrom v. Tillamook County, 844 F.2d 598, 601 (9th Cir. 1987) ("Section 6972(b) and its legislative history reflect Congress's belief that the citizen-plaintiff working with the state or the EPA can better resolve environmental disputes than can the courts. … Litigation should be a last resort only after other efforts have failed.").

Here, the Court's consideration of any proposed injunction will need to take into account the existing broad authority of the Oklahoma Department of Environmental Quality ("ODEQ") and the Oklahoma Department of Health to immediately investigate, address, and abate public health emergencies, see 27A Okla. Stat. § 2-3-502(E) (ODEQ); 63 Okla. Stat. § 1-106(B)(1)

(Department of Health), and the similar broad authority of ODEQ and the State Board of Agriculture to order the cessation of any pollution of Oklahoman land, water, or air, see 2 Okla. Stat. § 2-18.1(B) (Board of Agriculture); 27A Okla. Stat. § 2-6-105(B) (ODEQ).

g. Has the State proven that its proposed injunction will guarantee the elimination of the claimed irreparable harm?

A plaintiff has no standing to seek an injunction where the grant of the injunction will not guarantee the elimination of the harm alleged. Leeke v. Timmerman, 454 U.S. 83, 86-87 (1981). Thus, a party asking a court to issue an injunction must demonstrate that the injunction sought will actually remedy the harm claimed. See Humble Oil & Ref. Co. v. Harang, 262 F. Supp. 39, 43 (D. La. 1966) (stating that a court should "refrains from issuing an injunction unless the injunction 'will be effective to prevent the damage which it seeks to prevent'" (quoting Great N. Ry. Co. v. Local Union No. 2409, 140 F. Supp. 393, 396 (D. Mont. 1955))); see also Garrison v. Baker Hughes Oilfield Operations, Inc., 287 F.3d 955, 962 (10th Cir. 2002) ("It is well settled an injunction must be narrowly tailored to remedy the harm shown.").

With respect to Plaintiff's proposed prospective injunction, this inquiry has at least two stages:

1. Has the State proven that an Order directed to any of the Defendants here would actually reduce the amount of poultry litter land-applied in the IRW, given that the owners of the litter are not parties to the case and the Defendants have no authority, contractual or otherwise, to direct their disposition of the litter?

2. Assuming *arguendo* that an Order would reduce the amount of poultry litter land applied in the IRW, has the State proven that such a reduction would eliminate the "irreparable harm" on which it bases its claims?

With respect to Plaintiff's proposed injunction directing remediation, the question for the Court will be whether the State has proved that the remediation that the State proposes will in fact cure whatever harms the State can demonstrate at trial.

h. Has the State proven that the injunction it seeks against a particular Defendant no more extensive than is necessary to eliminate the irreparable injury (if any) caused by that Defendant?

"It is well settled an injunction must be narrowly tailored to remedy the harm shown." Garrison, 287 F.3d at 962. Such a remedy "must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." Lewis v. Casey, 518 U.S. 343, 357 (1996). Isolated incidents cannot justify an injunction imposing broad change in areas where a plaintiff has failed to demonstrate systemwide violations. See, e.g., id. at 360 (holding two instances of injury insufficient to justify injunction granting systemwide relief); see also Califano v. Yamasaki, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.").

In particular, an injunction should not be "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." NLRB v. Birdsall-Stockdale Motor Co., 208 F.2d 234, 237 (10th Cir. 1953). The Tenth Circuit has also cautioned that injunctive relief should not be so broad that it limits activity deemed lawful by statutes and regulations. See Garrison, 287 F.3d at 961-62.

Applying this standard to RCRA, the Court must determine whether the State has proven that the injunction it seeks is no broader than necessary to abate the "imminent and substantial endangerment to human health or the environment" on which the RCRA claim is based. As to nuisance and trespass, the Court must ask whether the State has proven that the proposed injunction is no broader than necessary to "cure" whatever harm the State can show at trial.

i. Would judicial enforcement of the proposed injunction impose undue administrative or long-term burdens on the Court?

Finally, the Court must address whether the injunction sought is "enforceable, workable, and capable of court supervision." In re Diet Drugs Prods. Liab. Litig., 369 F.3d 293, 315 (3d

Cir. 2004) (citing Lemon v. Kurtzman, 411 U.S. 192, 200 (1973)). As the Restatement notes: "In determining the appropriateness of injunctive relief, the court must give consideration to the practicality of drafting and enforcing the order or judgment. If drafting and enforcing are found to be impracticable, the injunction should not be granted." Restatement (Second) of Torts § 943 cmt. a. Thus, a court should not "issue an injunction that would be inconvenient or inefficient to administer." E.g., Bray v. Safeway Stores, Inc., 392 F. Supp. 851, 868 (D. Cal. 1975).

Similarly, the Court must consider the likely length and burden of its own involvement with enforcing the injunction. As one court noted:

> A court will not grant... an injunction if this would impose on it burdens of enforcement or supervision that are disproportionate to the advantages to be gained. ... The burdens may be particularly heavy if judging the quality of the performance poses difficult problems or if supervision will be required over an extended period of time.

In re Fullmer, 323 B.R. 287, 302 (Bankr. D. Nev. 2005) (quoting 3 E. Allan Farnsworth, Farnsworth on Contracts § 12.7(2d ed. 2001). Thus, "[i]f a court would be required to assume continuous duties of supervision, injunctive relief is inappropriate and must be denied." 8600 Assoc., Ltd. v. Wearguard Corp., 737 F. Supp. 44, 46 (E.D. Mich. 1990).

Such reservations are particularly compelling where an administrative agency already exists to address the specific conduct at issue on a long term basis. "Courts should be, and generally are, reluctant to issue 'regulatory' injunctions, that is, injunctions that constitute the issuing court an ad hoc regulatory agency to supervise the activities of the parties." Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, 970 F.2d 273, 277 (7th Cir. 1992); see also Des Moines, 264 F.2d at 459 (holding that "the trial court was entitled to require that the administrative question inherent in the situation be precedingly referred" to an administrative agency with authority before adjudicating the motion for injunction).

Here, the State "ask[s] the Court to enjoin land application [of poultry litter] above agronomic needs for phosphorus." (Dkt. No. 2579 at 5.) To determine whether a particular Defendant is in compliance with such an injunction, the Court would need to determine (1) whether each specific application of poultry litter had been to a field with an agronomic need for phosphorus, and (2) whether the amount of poultry litter actually applied exceeded that agronomic need. Nor would this be a one-time calculation; phosphorus levels in particular fields can vary from year to year based on a number of factors, meaning that each new annual application would require a new compliance evaluation for each field. The Court's evaluation of Plaintiff's requested remedy will need to take this burden into account.

Any consideration of the workability of any injunction under RCRA must also include the question of what would be done with the litter that was formerly land-applied. RCRA requires "solid waste" to be disposed of in "sanitary landfills" that are regulated under the Act. 42 U.S.C. § 6944. Thus, if the Court enjoins the application of poultry litter as "solid waste" under RCRA, the litter cannot simply be hauled out of the IRW and spread elsewhere, as some of Plaintiff's submissions suggest. If the Court were to adopt the State's position that poultry litter is RCRA solid waste, *all* poultry litter (not just litter that exceeds an agronomic need) would need to be disposed of in a RCRA-compliant sanitary landfill. Moreover, the unavoidable extension of any such holding would be that *all* animal excrement and all materials that contain it would likewise constitute RCRA "solid wastes" subject to the same disposal requirements.

3. Injunctive relief under Plaintiff's statutory claims.

As part of Count 7, the State also seeks "injunctive relief against the Poultry Integrator Defendants compelling compliance with 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1." (Sec. Am. Compl. ¶ 131.) In addition to the other issues with injunctions raised above, this request implicates the judicial reluctance to issue broad injunctions that merely instruct the

enjoined party not to violate a statute. See, e.g., NLRB v. Express Publ'g Co., 312 U.S. 426, 435-36 (1941); KSM Fastening Sys., Inc. v. H.A. Jones Co., 776 F.2d 1522, 1526 (Fed. Cir. 1985). "Such injunctions increase the likelihood of unwarranted contempt proceedings for acts unlike or unrelated to those originally judged unlawful." Int'l Rectifier Corp. v. IXYS Corp., 383 F.3d 1312, 1316 (Fed. Cir. 2004).

B. Civil penalties.

In addition to injunctive relief, the State also seeks the remedy of civil penalties against Defendants based on claimed violations of 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1. A defendant "[m]ay be punished in civil proceedings in district court by assessment of a civil penalty of not more than Ten Thousand Dollars ($10,000.00) for each violation." 27A Okla. Stat. § 2-3-504(A)(2). "[E]ach day or part of a day upon which such violation occurs shall constitute a separate violation." 27A Okla. Stat. § 2-3-504(D). The statute provides the Court with the following standard for determining the amount of any such civil penalty:

> In determining the amount of a civil penalty the court shall consider such factors as the nature, circumstances and gravity of the violation or violations, the economic benefit, if any, resulting to the defendant from the violation, the history of such violations, any good faith efforts to comply with the applicable requirements, the economic impact of the penalty on the defendant, the defendant's degree of culpability, and such other matters as justice may require.

27A Okla. Stat. § 2-3-504(H).

CONCLUSION

The Cargill Defendants hope the summary above is of assistance to the Court in addressing the issues likely to arise in the trial of this case. The Cargill Defendants stand ready to explain or provide any additional briefing on any issues as the Court might find useful.

Dated: September 21, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 21st day of September, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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